

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

SHERRIE BAILEY,  
Plaintiff,  
v.  
**I-FLOW CORPORATION**, a Delaware  
corporation; **DJO, LLC**, a Delaware  
corporation; and **DJO, INC.** f/k/a **DJ  
ORTHOPEDICS, INC.**, a Delaware  
corporation,  
Defendants.  
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No. 09-CV-0531 WJ/DJS  
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**PLAINTIFF SHERRIE BAILEY'S  
RESPONSE IN OPPOSITION TO  
DEFENDANT DJO, INC.'S  
MEMORANDUM AND MOTION TO  
DISMISS PURSUANT TO RULE  
12(b)(6) FOR FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF CAN  
BE GRANTED**  
)

## I. INTRODUCTION

Not content with the Court’s first ruling on the issue, DJO LLC has briefed this issue a second time, I-Flow has moved the Court for a third time to find that plaintiff’s conspiracy claim fails as a matter of law. What should be a simple joinder by DJO Incorporated is now a fourth, duplicative brief on the issue. The second motion by DJO (Doc. 95), the third motion by I-Flow (Doc. 97), and now a fourth motion by DJO Incorporated (Doc. 103) are little more than motions for reconsideration. For the reasons previously briefed, the Court should deny DJO’s motion, because construing all inferences in favor of plaintiff, her First Amended Complaint is sufficient as a matter of law. Plaintiff addresses each argument in turn.

## A. PRIOR BRIEFS AND RULING ON CONSPIRACY CLAIMS

Before the plaintiff filed her First Amended Complaint, she filed a motion which was opposed by I-Flow on many of the same grounds now re-argued by I-Flow. *See Plaintiff's Motion to Amend Complaint*, (Doc. 43), *Order Granting Plaintiff's Motion to Amend Complaint and Order Modifying Caption of Complaint*, (Doc. 80). After filing her First Amended Complaint, DJO filed its *Motion to Dismiss* (Doc. 95), which plaintiff has opposed (Doc. 102).

Then, I-Flow filed its *Motion to Dismiss* (Doc. 97). Plaintiff adopts this prior briefing and ruling of the Court as if fully set forth herein. The Court previously applied the standards of *Twombly* and *Iqbal*, and I-Flow's arguments under these cases are nothing more than a reiteration of arguments previously considered and rejected by the Court. The Court previously ruled that plaintiff's claims were not futile "if the proposed amended complaint sets forth sufficient facts to survive a motion to dismiss." (Doc. 79 at p. 3). The Court should affirm its earlier ruling that the amended complaint would survive a motion to dismiss, and deny DJO Incorporated's motion to dismiss.

**B. ARGUMENTS NOT IN PRIOR BRIEFS**

Reviewing DJO Incorporated's brief, it appears that apart from the length of the introduction, DJO Incorporated's brief is word for word identical to DJO, LLC's brief. Plaintiff therefore relies on the other briefing incorporated by reference, to spare the Court time wasted reading duplicate briefs.

Dated: August 2, 2010.

Respectfully submitted,

**WILLIAMS LOVE O'LEARY & POWERS, P.C.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of August, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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